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No. 763

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NATIONAL SCREEN SERVICE CORPORATION, ET AL.,

Petitioners

versus

EXHIBITORS POSTER EXCHANGE, INC.,

Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

The Court need only examine the initial question presented for review, as stated both by Petitioners[1] and Respondent,[2] to determine that certiorari should be granted. It is the same question that has been before the lower federal courts since 1961 and, simply stated, it is whether under present federal antitrust laws a complaint based on a continuing course of allegedly illegal business activity can result in a judgment concluding, *once and for all*, the legality of that activity as between the parties. Petitioners contend that it can;

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[1] Petition for Certiorari, p. 2.
[2] Respondent's Brief in Opposition, p. 1.

Respondent insists that it cannot. Each position finds support in a decision of a different court of appeals. Petitioners' answer is based on the Eighth Circuit's decision in *Englehardt*;[3] Respondent's answer is now based on the decision of the court below.

The conflicting answers result from acceptance by the court below of Respondent's misreading of this Court's decision in *Lawlor*.[4] Respondent expressly acknowledges in its Brief in Opposition[5] that the claim in this case is "based on the same monopoly" as the "two preceding cases" but attempts to escape from res judicata and collateral estoppel by an insistence on reading *Lawlor* as authority for the proposition that subsequent time periods necessarily mean new causes of action. Acceptance of this proposition would mean that conduct previously adjudged to be legal could, through the mere passage of time, become illegal. Such a metamorphosis would inevitably result in the elimination of the concept of res judicata from our jurisprudence.

Respondent also seeks to revive a second novel contention, properly rejected "out of hand"[6] by the Court of Appeals, that a summary judgment cannot serve as the basis for collateral estoppel. Acceptance of this contention would lead to an equally absurd result, *viz:* elimination of the summary judgment device as an effective procedure for disposition of cases that do not involve a factual dispute. Of course, a summary judgment can have collateral estoppel effect, and the Court

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[3] Englehardt v. Bell & Howell Co., 327 F.2d 30 (1964).

[4] Lawlor v. National Screen Service Corp., 349 U.S. 322 (1955).

[5] Respondent's Brief in Opposition, p. 2.

[6] Exhibitors Poster Exchange, Inc. v. National Screen Service Corp., 421 F.2d 1313, at p. 1319, Appendix to Petition, p. 39.

of Appeals here conducted its own "painstaking examination" of the record to determine the specific issues disposed of in Suit No. 1 and in Suit No. 2[7] — a determination which Respondent does not and cannot challenge.

The need for certiorari in this case is apparent from a reading of the Petition and Respondent's opposition as summarized above. However, the other points made in the Brief in Opposition require a brief response in order to set the record straight. Our response on each of these points is numbered to conform with the numbers assigned the points in the Brief in Opposition.

(1)

This is not the time to argue about the decision in the *Poster Exchange* case,[8] despite Respondent's curious tactic of reproducing the opinion in that case as an appendix to the Brief in Opposition. That case will be dealt with appropriately in a Petition for Certiorari now being prepared by National Screen.

What must be dealt with here, however, is Respondent's attempt to argue away the significance of the trial in the *Lawlor* case. In asserting that, "The Court entered no finding of fact with respect to either monopoly or conspiracy, and only qualified conclusions of law",[9] respondent grossly misrepresents the decision in *Lawlor*.

The trial judge in *Lawlor* expressly found that each of the Producers' license agreements relied on by the

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[7] 421 F.2d at p. 1320, Appendix to Petition at pp. 41-42.
[8] Poster Exchange, Inc. v. National Screen Service Corp., CCH Trade Reg. Rep. ¶73,305 (5th Cir., Aug. 24, 1970).
[9] Respondent's Brief in Opposition, p. 7.

plaintiff there and Respondent here was entered into without consultation with any other motion picture company, independently of the action of any other company, and solely on the basis of the licensor's own business interests."[10] The trial judge, based on these and other findings, unequivocally concluded that National Screen "did not monopolize or attempt to monopolize within the meaning of Section 2 of the Sherman Act" and that neither National Screen nor any of the Producers combined or conspired with any other defendant or defendants within the meaning of Section 1 of the Sherman Act."[11]

The Court of Appeals for the Third Circuit, in affirming the decision in favor of the defendants in *Lawlor*, noted that, "the great weight of credible evidence clearly shows that the film companies, acting independently, as a result of substantial losses in their accessory business, decided to license an outsider to perform that phase of their business. They contracted with National Screen because no comparable firm was available to undertake the task."[12]

(2)

Respondent resorts to play on words when it says that it is "not true at all"[13] that it is undisputed that Respondent is relying for the third time on the same facts as to Petitioners' liability. Respondent's only point is that the time period is different.

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[10] Lawlor v. National Screen Service Corp., Civil Action No. 10,020 (E.D. Pa. Oct. 22, 1958), Findings 37, 60, 64, 76, 82, 89, 102, 106.

[11] *Id.*, Conclusions of Law 3 and 4, 15 U.S. §§ 1, 2.

[12] Lawlor v. National Screen Service Corp., 270 F.2d 166 (3d Cir. 1959).

[13] Respondent's Brief in Opposition, p. 8.

This Court's decision in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*[14] has no relevance here. The holding in that case was that there was a continuing violation of the antitrust laws from 1912 until 1955 because *United* refused to sell shoe machinery and insisted on only leasing the machines. Plaintiff was permitted to recover damage caused by that policy during the statutory period. No prior suit was involved, res judicata was not an issue, and the holding hardly means that the plaintiff could also have recovered for the later period if it had sued earlier and had suffered a determination that the facts relied on did not amount to a violation.

Petitioners do not seek immunity from liability for "future violations." They seek protection against repetitive litigation of the same issues which have been twice previously determined against Respondent.

(3)

Petitioners' motions for summary judgment were supported by a showing of the prior judgments in their favor. Our point under Rule 56(e)[15] is that Respondent could have avoided the summary judgment which the District Court correctly ordered only by showing by affidavits or testimony that Respondent relied on the existence of new unlawful conduct which allegedly occurred after 1961. This Respondent altogether failed to do.

(4)

Respondent resorts again to invective and distortion. Its characterization of Petitioners as "conscienceless mo-

[14] 392 U.S. 481 (1968).
[15] Federal Rules of Civil Procedure, Rule 56(e).

nopolists"[16] flies in the teeth of prior adjudications that there has been no violation of law and is only buttressed by a shameful use of a truncated, inaccurately introduced quotation from the decision of the United States District Court for the Northern District of Georgia in the Poster Exchange case, which did not deal at all with National Screen's "veracity." The full paragraph from which Respondent wrenched the misleading quotation on page 11 of the Brief in Opposition reads as follows:[17]

> "So, in view of the above-quoted language [from UNITED STATES V. GRIFFITH, 334 U.S. 100, 105 (19), holding that a finding of specific intent to restrain trade or build a monopoly is not necessary to a conclusion that there has been a violation of the antitrust laws], it appears to this Court that National Screen now cannot be heard to say that it did not intend to monopolize but only to exercise legitimate business judgment, in view of its admission that immediately after it entered the competitive field in this case it actually drove twenty-eight previously established poster renters completely out of business by virtue of acquiring their businesses by outright purchase."

National Screen made no such admission in the Poster Exchange case, and there was no evidence whatever in that case to support the conclusion just quoted. Furthermore, we note in passing that the District Court in the *Lawlor* case, which had before it the same facts

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16 Respondent's Brief in Opposition, p. 10.

17 Poster Exchange, Inc. v. National Screen Service Corp., Civil Action No. 7665, U. S. District Court, Northern District of Georgia, Judgment of February 14, 1969, p. 16.

as to National Screen's acquisition of various poster renters in 1940, reached no such conclusion."[19]

(5)

Here, again, Respondent begs the question by insisting that Petitioners are engaging in a continuing violation of the antitrust laws, in spite of the summary judgments in the two prior actions concededly based on the same facts and allegedly unlawful conduct. It is at least clear that Respondent is relying on the same facts twice previously adjudicated not to violate the antitrust laws.

(6)

Respondent's reading of this Court's decision in *Lawlor* may be plain enough to Respondent, but it has engendered the obvious confusion suffered by the court below.[19] Moreover, *Lawlor* has resulted in diametrically opposed interpretations by the Courts of Appeals for the Sixth and Eighth Circuits.

The Court of Appeals for the Eighth Circuit, in *Englehardt*,[20] dealt with a claim of continuing damage resulting from defendant's refusal to deal with plaintiff and defendant's enforcement of that refusal by threatening and boycotting other dealers to prevent them from dealing

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[19] Lawlor v. National Screen Service Corp., Civil Action No. 10,600 (E.D. Pa. Oct. 22, 1953). The District Court's Finding of Fact 42 recited the fact of the poster renter acquisitions. The court there rejected Finding 88 requested by the plaintiff which read:

"At the time of its entering into the standard renting business in 1940, National Screen intended to compel all other existing poster-renters to sell out their businesses to it or to otherwise cease doing business as poster-renters; and at that time, National Screen intended also to prevent any other person from attempting to commence doing business as a poster-renter at anytime thereafter anywhere in the United States."

[19] Petition for Certiorari, p. 13.

[20] Englehardt v. Bell & Howell Co., 327 F.2d 30 (1964).

with plaintiff."[1] Just as that case involved the "single controversy" urged by Respondent in attempting to distinguish it, this case, too, involves a single controversy — viz., whether National Screen's 1961 refusal to deal with Respondent amounts to a violation of the antitrust laws. The court's holding in *Englehardt* was that *Lawlor's* rejection of res judicata depended on new and different conduct in the later time period. Accordingly, the Court in *Englehardt* held that *Lawlor* did not preclude res judicata from barring a claim based on alleged continuing violations which were the subject of an earlier case decided adversely to the claimant. In other words, a mere difference in time period did not mean that there was a new cause of action for the purpose of determining the applicability of res judicata.

Thus, despite the efforts of the court below and of Respondent to distinguish *Englehardt*, it is apparent that the Court of Appeals for the Eighth Circuit did not read *Lawlor* as Respondent reads it. It is equally clear that the court below reached a result consistent with Respondent's reading.

Finally, in a factually distinguishable context, the Court of Appeals for the Sixth Circuit, in *Cream Top Creamery v. Dixie Milk Co.*,[2] indicated its reading of *Lawlor* is incompatible with the Eighth Circuit's reading in *Englehardt*. Relying on *Lawlor*, *Cream Top Creamery* would seem to allow repetitive suits attacking as illegal

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[1] See 327 F.2d at p. 33 for further details of the allegations in the complaints there.

[2] 382 F.2d 282 (1967). Whereas Respondent's suit and *Englehardt* involved a continuing pattern of refusal to deal, allegedly illegal, Cream Top Creamery involved a continuing pattern of sales allegedly discriminatory as to price.

a pattern of alleged antitrust violations previously judged to be legal."[23]

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of this Reply Brief have been served in accordance with paragraph 1 of Rule 33 of the rules of this Court on the 30th day of October, 1970.

PAUL O. H. PIGMAN

[23] *Id.*, at p. 363.